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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

NO. 77-636

Melvin L. Roberts,

Appellant,

versus

Jesse C. Johnson, Fire Marshal of the State of South Carolina,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Rule 16(1)(b) of the Revised Rules of the Supreme Court of the United States, Jesse C. Johnson, Fire Marshal of the State of South Carolina, the appellee in the above-entitled action, moves the Court to dismiss the appeal herein on the ground that it is manifest that a substantial federal question is not presented.

QUESTION PRESENTED

Whether the appellant has demonstrated that his challenge to certain regulations of the State Fire Marshal of the State of South Carolina presents a substantial federal question?

STATEMENT

The State Fire Marshal on February 8, 1973, instituted an action in the Court of Common Pleas for York County, South Carolina, to enjoin the appellant Melvin L. Roberts from operating self-service gasoline stations unless a qualified attendant was on duty in order, among other things, to supervise, observe, and control the dispensing of gasoline as required by

Sections 16.74[1] and 16 F(1)[2] of the Fire Prevention Code. When the Court of Common Pleas denied the State Fire Marshal the relief which he sought and invalidated the provisions of the Fire Prevention Code on

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1/ Each service station open to the public shall have an attendant or supervisor on duty whenever the station is open for business.

2/ Dispensing Systems.

. . .

F. Special Type Dispensers.
(1) Approved special dispensing devices such as, but not limited to, coin-operated, cord-operated, and remote preset types are permitted at service stations, provided there is at least one qualified attendant on duty while the station is open to the public. The attendant's primary function shall be to supervise, observe and control the dispensing of Class I liquids while said liquids are being dispensed. It shall be the responsibility of the attendant to prevent the dispensing of Class I liquids into portable containers not in compliance with Section 16-73e, control sources of ignition, and to immediately handle accidental spills and fire extinguishers if needed.

which he based his complaint, he appealed to the Supreme Court of South Carolina. The latter upheld the questioned provisions of the Fire Prevention Code, reversing the Court of Common Pleas and remanding the case for further proceedings.

REASONS FOR GRANTING MOTION TO DISMISS

Rule 15(e) of the Revised Rules of the Supreme Court of the United States prescribes that the Jurisdictional Statement shall contain, among other things, "the reasons why the questions presented are so substantial as to require plenary consideration." Although the appellant has set forth three questions which he claims raise substantial federal issues [J.S. at 7-8], nowhere does he include the reasons why those questions are substantial enough to warrant plenary consideration by this Court. [J.S. at 15-20]. Instead, he merely argues that he has a right of appeal when substantial federal questions are involved. The failure to state the grounds for believing his questions are substantial is itself an indication that the federal questions purportedly here involved lack substantiality. That they

do in fact lack substantiality is made clear below.

The appellant claims, first of all, that the adoption by the State Fire Marshal of the regulations complained of was an unreasonable exercise of the State's police powers because, he says, "there was no evidence introduced to show a single fire due to the self-service feature at any gasoline station" and also because "there had been no showing of any reasonable relationship between the deprivation of appellant's rights and any actual and manifest evil." [J.S. at 7]. Not long ago, this Court acknowledged that its function in reviewing a state statute is a limited one. Mr. Justice Powell, speaking for the Court, said,

> We do not inquire whether [the] statute is wise or desirable, or "whether it is based on assumptions scientifically substantiated." Roth v. United States, 354 U.S. 476, 501, 1 L.Ed.2d

> 1498, 1516, 77 S.Ct. 1304 (1957) (Separate Opinion of Harlan, J.). Misguided laws may nonetheless be constitutional. ...Our task, however, is not to weigh [a] statute's effectiveness but its constitutionality. James v. Strange, 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 at 606 (1972).

The validity of the regulations in question, we submit, does not depend upon whether or not there has been a fire at a self-service gasoline station. It is enough that the possibility exists that a fire will break out at such a place, or that gasoline dispensed thereat might be mishandled or misused and that, as a consequence, injury to life or property might result. Indeed, the State Supreme Court found, contrary to the appellant's position, that the promulgation of those regulations was a reasonable exercise of the State's police powers and that those regulations are "reasonably related to the public health, safety, and welfare" [J.S. at

105-106], as in fact they are. Quite clearly, the requirement that an attendant be present at a self-service gasoline station, as at any other station, for the purpose of supervising, observing and controlling the dispensing of gasoline, preventing the dispensing of gasoline into proscribed containers, controlling sources of ignition, and handling immediately accidental spills and fire extinguishers, if such be required, bears a reasonable relation to the end sought to be accomplished by those regulations, namely, the prevention of the loss of life and property, or injury thereto, caused by the improper dispensing, use and handling of gasoline, a highly flammable liquid. The question, then, as to whether the regulations in issue represent a constitutional exercise of the State's police power is not substantial.

Regarding the appellant's contention that he has been "singled out for enforcement

of Sections 16.74 and 16.75 F(1) of the Fire Prevention Code while other installations... were all permitted to operate...without any action being undertaken...against them" [J.S. at 7-8], it is not enough to show that a law or regulation has not been enforced against other persons. McKay Tel. & Cable Co. v. Little Rock, 250 U.S. 94, 39 S.Ct. 428, 63 L.Ed. 863 (1919).

> There must be something more, - something which in effect amounts to an intentional violation of the essential principle of practical uniformity. Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 38 S.Ct. 495, 62 L.Ed. 1154 at 1156 (1918).

See also, Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). But here, as the State Supreme Court has found [J.S. at 103-104], there was no such showing made:

> The record fails to support the charge of discriminatory classification and enforcement with respect to [appellant's] operations. The basis for distinguishing between [appellant's]

> self-service business and that of...convenience stores is evident - the latter maintains an attendant while the business is open to the public and according to the testimony of the Fire Marshal, the failure of this attendant to supervise the dispensing of gasoline would constitute a violation of the regulation. We fail to find evidence of discriminatory enforcement such as to deny [appellant] equal protection or due process of law. [J.S. at 103-104].

Actually, the appellant does not seriously challenge that conclusion. No substantial federal question is presented, therefore, as to an alleged discriminatory administration of the Fire Prevention Code provisions under attack.

Finally, the appellant maintains that the Occupational Safety and Health Act of 1970 [29 U.S.C. § 655] preempted Sections 16.74 and 16.75 F(1) when the Occupational Safety and Health Administration (OSHA) established jurisdiction over "self-service, unattended stations, while also specifically ruling that attendants are unnecessary for

safety." [J.S. at 9]. The purpose of the 1970 Act is, of course, to assure safe and healthful working conditions for working men and women [29 U.S.C. § 651; cf., Accu-Namics, Inc. v. Occupational Safety and Health Review Commission, 515 F.2d 823, rehearing denied, 521 F.2d 814 (5th Cir. 1975), certiorari denied, 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752 (1976)], and not to provide safe and healthful purchasing conditions for retail customers and other members of the general public. We do not believe that Congress, when it enacted the Occupational Safety and Health Act of 1970, intended that the safety and health standards established by OSHA for employees and businesses engaged in inter-state commerce were to supplant regulations designed to protect persons other than employees. Nor do we believe that, on March 15, 1974, when OSHA deleted its requirement that each self-service gasoline station have

an attendant on duty, it intended to preclude an attendant's elective or state-mandated presence at such a station. At any rate, because there is no longer a federal law requiring an attendant at a self-service gasoline station, there can no longer be, as the State Supreme Court pointed out, a question of federal preemption of the field occupied by the challenged regulations. [J.S. at 104-105]. Furthermore, and again as the State Supreme Court noted, 29 U.S.C. § 667 provides:

> Nothing in [the Occupational Safety and Health Act] shall prevent any state agency... from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 655 of this Title.

Even were we to concede, and we do not, that Sections 16.74 and 16.75 F(1) of the Fire Prevention Code constitute <u>occupational</u>

safety or health regulations, such would be permissible since there is no OSHA standard presently in effect regarding attendants at self-service gasoline stations. As before, the appellant has failed to present a substantial federal question.

CONCLUSION

It is respectfully submitted, therefore, that the appellant presents no substantial federal question for the decision of this Court and that, accordingly, this appeal should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, C. Tolbert Goolsby, Jr., of counsel for Appellee Jesse C. Johnson, Fire Marshal of the State of South Carolina, and a member of the Bar of this Court, do hereby certify that in accordance with Rule 33, three (3) copies of the Appellee's Motion to Dismiss were served on Appellant on this date by depositing same in the United States mail, postage prepaid, and addressed as follows: Lee S. Alford, Esquire, Attorney at Law, Post Office Box 340, York, South Carolina, 29745; said address being within five hundred (500) miles from the point of mailing.

This 18th day of January, 1978.

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